

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
and	)	
	)	
Interconnection Between Local Exchange	)	
Carriers and Commercial Mobile Radio	)	CC Docket No. 95-185
Service Providers	)	

**BROADBAND OFFICE COMMUNICATIONS INC.  
REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

BroadBand Office Communications Inc. ("BBOC")<sup>1</sup> hereby submits its reply to the oppositions filed by U S WEST and SBC Corporation to MGC Communications, Inc.'s petition for reconsideration of the *UNE Remand Order*.<sup>2</sup> BBOC, like petitioner MGC, is a competitive local exchange carrier ("CLEC") providing facilities-based telecommunications services. Like MGC, BBOC leases unbundled network elements ("UNEs") from incumbent local exchange carriers ("ILECs"). The availability of "dark fiber" UNEs will greatly facilitate the delivery of high bandwidth telecommunications and e-commerce services to customers by BBOC. In addition, as compared with most ILECs' tariffed transmission services, the availability of dark fiber provides CLECs such as BBOC with much needed flexibility to provide capacity that meets

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<sup>1</sup> BBOC is a subsidiary of BroadBand Office, Inc. ("BroadBand Office" or "BBO"). BBO is a privately held company formed in July 1999 by the venture capital firm of Kleiner Perkins Caulfield & Byers and a number of real estate firms. BBO's core business is to enable customers simply to plug into a BroadBand Office wall jack and immediately access a full range of communications and Internet services and E-business solutions. BBO began providing service in the fourth quarter of 1999 and is currently rolling out its services nationally. By the end of 2000, BBO plans to offer services in over thirty major metropolitan service areas.

customer needs, and to fulfill customers' demands for the delivery of e-commerce as well as other emerging applications. The delivery of these software applications over high bandwidth connections is a rapidly emerging market and could represent an important competitive advantage for American businesses against their global competitors. The Commission could help accelerate the development of both the telecommunications market and the applications services market by ensuring that new entrants have the ability to provide high speed connections using ILEC dark fiber without undue delay. For these reasons, BBOC supports MGC's petition.

**I. The Commission Should Adopt a "Twelve-Month" Guideline to Prevent ILECs from Warehousing Dark Fiber.**

MGC has requested that the Commission limit the ILECs' ability to reserve UNEs, including dark fiber, for their own future use.<sup>3</sup> MGC asserts that ILEC reservations of capacity should be permitted only to meet existing, documented customer commitments and should be no longer than necessary.<sup>4</sup> MGC argues that the most time-consuming task of installing dark fiber, the laying of the fiber itself, has already been completed, so that a reservation period of not more than six months should be sufficient to allow the ILEC to plan for and provision services employing dark fiber.<sup>5</sup>

U S WEST opposes MGC's request, arguing that six months is too short a time period, particularly in the northern states where the ground may be frozen for many months, or where an ILEC may otherwise be unable to complete a construction project within six months.<sup>6</sup> In addition, according to U S WEST, MGC ignores the need for carriers to maintain maintenance spares in its network, so that service to customers is not interrupted when a given fiber facility

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<sup>2</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

<sup>3</sup> MGC Petition at 4-6.

<sup>4</sup> *Id.* at 5.

becomes inoperative.<sup>7</sup> According to U S WEST, a “better standard” would be to allow an ILEC to reserve capacity “where the ILEC has fully funded – i.e., actually budgeted the resources to complete – a given customer commitment.”<sup>8</sup>

BBOC submits that a standard such as the “fully funded – actually budgeted” standard recommended by U S WEST would be extremely difficult to implement. Resolution of disputes would require examination, on a case-by-case basis, of ILECs’ customer commitments and construction budgets. Such proceedings would likely be lengthy, costly and contentious. As a consequence, adoption of such a standard would likely serve to further delay competitors’ access to dark fiber. At the same time, BBOC recognizes that a six-month limit on reservation of dark fiber capacity by ILECs may be too stringent in some cases, and that some allowance needs to be made for maintenance spares.

A reasonable balance can be struck between the need of the ILECs to reserve dark fiber capacity for their own use and the interests of competitors in ensuring that ILECs do not engage in unreasonable warehousing of dark fiber. When a CLEC requests a dark fiber UNE from an ILEC, the request should be granted *unless* the ILEC can prove that: (1) it has a preexisting contract with a customer; (2) that contract requires the ILEC to provide service over the requested fiber(s) within twelve months of the date of the CLEC’s request; and (3) the ILEC’s service can only be provided cost-effectively over the unused strand(s) of dark fiber. If the ILEC satisfies these three criteria, it need not provide the requested fiber to the CLEC as a UNE. If the ILEC cannot demonstrate that it satisfies these criteria, the Commission should establish a heavy presumption that the ILEC must furnish the requested fiber to the CLECs. The twelve-

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<sup>5</sup> *Id.*

<sup>6</sup> U S WEST Response at 22.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

month period should provide ample time, even in states where construction is limited in winter months, for ILECs to complete projects involving deployment of dark fiber.

The Commission should clarify that ILECs bear the burden of proof in all proceedings before state commissions involving reservation of dark fiber capacity for their own future use. This is reasonable because ILECs possess the information that a state commission needs to resolve a dispute regarding the unbundling of dark fiber.

In addition, separate from the 12 month customer commitment exception from unbundling, the Commission should rule that ILECs may not reserve, as maintenance spares, quantities of dark fiber which exceed those specified in current telecommunications industry standards for service restoration. Industry standards regarding spare fiber were developed collectively by ILECs and reflect their own judgment as to proper inventories needed for maintenance spares. BBOC is unaware of any basis for the Commission to permit an ILEC to exceed the industry-prescribed standard. Accordingly, to address the need to reserve dark fiber as maintenance spares, the Commission should specifically limit ILEC maintenance spares to the level specified in industry standards.

## **II. The Commission Should Confirm the Applicability of the “Successors and Assigns” Rule to Dark Fiber Transferred by ILECs to Affiliated CLECs.**

MGC has expressed concern that ILECs may transfer all, or a disproportionate share, of their dark fiber to CLEC affiliates rather than make it available to competitors.<sup>9</sup> To address this concern, MGC has proposed that the Commission limit the percentage of an ILEC’s dark fiber that may be transferred to its CLEC affiliate to no more than 25 percent. MGC has also

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<sup>9</sup> MGC Petition at 6.

expressed concern that an ILEC could attempt to immunize itself from its Section 251 unbundling obligations by transferring dark fiber to its CLEC affiliate.<sup>10</sup>

In response to MGC's concerns that ILECs may seek to avoid their statutory obligations by transferring dark fiber to their affiliates, U S WEST argues that no additional safeguards are needed. According to U S WEST, the "successor or assign" rule already accomplishes this by making "network elements transferred to a BOC affiliate subject to the same unbundling obligations as if they had remained with the BOC."<sup>11</sup>

BBOC believes that the "successor or assign" rule should apply to an ILEC's sale or other transfer of dark fiber to its CLEC affiliate. In the interest of avoiding litigation over the successor or assign principle before many state commissions, BBOC requests that the Commission confirm that the "successor or assign" rule applies to dark fiber and that ILECs may not avoid their unbundling obligations by transferring dark fiber to their CLEC affiliates.

In the event the Commission does not apply the successor and assign rule to unbundled dark fiber, the Commission should establish a rule that limits the percentage of dark fiber that an ILEC can transfer to its CLEC affiliate. As explained by MGC, state arbitration proceedings could become unnecessarily complicated -- and CLECs' provision of service unnecessarily delayed -- by arguments regarding ILECs' transfer of dark fiber to their CLEC affiliates.

### **III. Provisions Governing Competitors' Use of Dark Fiber and Its Recapture by ILECs Must Be Fair and Reasonable.**

SBC, in the portion of its opposition addressed to MGC's petition, cites several provisions from its existing interconnection agreements that address prioritization of competing demands for dark fiber.<sup>12</sup> Without exception, the cited provisions impose limitations on

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<sup>10</sup> *Id.*

<sup>11</sup> U S WEST Response at 22-23.

<sup>12</sup> SBC Opposition at 48-49.

competitors' use of ILEC dark fiber and appear to be designed to address "warehousing" of dark fiber capacity by non-affiliated competitors. For example, one of the cited provisions, from the Southwestern Bell Telephone Company ("SWBT") – AT&T interconnection agreement, allows SWBT to revoke AT&T's dark fiber lease if, at any time during the first twelve months of the lease, AT&T uses the leased dark fiber capacity "at a level of transmission less than OC-12."

Just as ILECs should not be permitted to unreasonably limit competitors' access to dark fiber, they should also be subject to reasonable limits on their ability to "recapture" dark fiber from competitors. The Commission has recognized that limitations on competitors' use of dark fiber must take competitors' interests into account:

In establishing reasonable limitations and technical parameters for dark fiber, states should acknowledge that requesting carriers require regulatory certainty in order to implement their business plans.

*UNE Remand Order* ¶ 352.

Provisions that allow the ILEC to recapture dark fiber -- particularly where recapture involves revocation of a lease of fiber which is in use (albeit not at a transmission level deemed appropriate by the ILEC) -- fail to provide the degree of regulatory certainty that BBOC and others need in order to implement their business plans. As a very recent entrant into the telecommunications and applications markets, BBOC operates in a competitive and unpredictable environment. Thus, BBOC's speed to market, and the market's ultimate acceptance of our services, cannot be predicted with precision. BBOC therefore encourages the Commission ensure that state commissions do not impose use limitations on dark fiber that unreasonably allow ILECs to reclaim dark fiber UNEs too quickly. BBOC expects to develop and deploy applications and services that customers will purchase. The Commission should

ensure that states do not resolve dark fiber reclamation disputes in a way that converts this market uncertainty into an unwarranted competitive advantage for ILECs.


### CONCLUSION

For the reasons set forth herein, the petition for reconsideration filed by MGC Communications Inc. should be granted, with the modifications suggested herein, and the oppositions of U S WEST and SBC Communications should be denied.

Respectfully submitted,

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April 3, 2000

I, Christopher J. Lamb, do hereby certify that on this 3rd day of April, 2000, that I have served a copy of the foregoing document via \* messenger and U.S. Mail, postage pre-paid, to the following:



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